CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

17 SEP 1974

The Honorable William B. Saxbe
Attorney General
Department of Justice
Washington, D. C. 20530

Dear Mr. Saxbe:

On 24 April 1974 I wrote to you to express my concern over the Department's recommendation to the Office of Management and Budget against submission to Congress of legislation proposed by this Agency to amend the National Security Act of 1947 to furnish additional protection for intelligence information. In your reply on 14 May 1974, you expressed your agreement with my goal of preventing unauthorized disclosures of information relating to intelligence sources and methods and of successfully prosecuting violators. You noted that you had asked Assistant Attorneys General Rakestraw and Petersen to work with my General Counsel so that our proposed legislation would be acceptable to all concerned.

In the ensuing months your staffs and mine have had several conferences and have done a great deal of work in an attempt to draft legislation which would be acceptable to the Department and the Agency. While progress has been made and acceptable compromises reached on some issues, the Department and the Agency are still apart on several basic points. The Department has submitted a draft as a result of these conferences which I believe does not answer our needs in three major areas:

a. in camera court review of the protected information;

b. statutory injunction authority; and

c. recognition that heads of other departments and agencies engaging in intelligence activities may designate protected information.

I am enclosing the most recently modified drafts of the Department of Justice's and the Agency's proposed bills and a comparative analysis of

them. The Agency's newest draft attempts to accommodate some of the points posed by the Department.

With respect to court review, I believe that our position is fully consistent with the views expressed by President Ford in his letter of 20 August 1974 to the Chairmen of the Conference Committee Considering the Amendments to the Freedom of Information Act. The President's position was that he could not accept a provision of law which would

> ... place the burden of proof upon an agency to satisfy a court that a document classified because it concerns military or intelligence (including intelligence sources and methods) secrets and diplomatic relations is, in fact, properly classified,....

However, the President did state that he could accept a provision with an express presumption that the classification was proper and with in camera judicial review. The President then stated:

> Following this review, the court could then disclose the document if it finds the classification to have been arbitrary, capricious, or without a reasonable basis.

It is our intent that the in camera review would take place with defense counsel participating.

As I stated in my earlier letter to you, I consider the statutory injunction provision extremely important and believe that the difficulties in securing an injunction in the Marchetti case sufficiently show that another court in another case might not enjoin in the absence of statutory authority. Also, in some cases I believe the injunctive authority can be as great or a greater deterrent to disclosure than is a potential criminal penalty and, more importantly, is more likely to prevent disclosure. While the Department's draft does not include the injunction provision, I understand the Department now may be willing to consider supporting it.

The Department's draft deals only with designation of classified information relating to intelligence sources and methods by the Director

of Central Intelligence. This Agency is only one part of the entire intelligence community. Consequently, it is imperative that the coverage of this bill extend to the entire intelligence community, and the designation of information should extend to other departments and agencies of the United States Government which engage in intelligence activities.

There are a number of other differences of lesser importance between the positions of your staff and mine, but I believe some of these can be worked out. Nevertheless, there are significant differences in the three areas mentioned above, and I feel the need to provide adequate protection to intelligence sources and methods is impelling and well demonstrated. I would hope that we can still work toward a more effective compromise in time for it possibly to be included in the bill (H.R. 15845) amending the National Security Act of 1947, which may be reported by the House Armed Services Committee in the near future. To this end I would like to discuss this personally with you.

Sincerely,

/s/ Bill

W. E. Colby
Director

Enclosures

Original - Addressee
1 - DCI
1 - DDCI
1 - ExSecy via ER ✓
1 - OGC

CIA/OGC DRAFT
12 September 1974

A BILL

To amend the National Security Act of 1947, as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 102 of the National Security Act of 1947, as amended, (50 U.S.C.A. 403) is further amended by adding the following new subsection (g):

(g) In order further to implement the proviso of section 102(d)(3) of this Act that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure --

(1) Whoever, being or having been in duly authorized possession or control of information relating to intelligence sources and methods, or whoever, being or having been an officer or employee of the United States, or member of the Armed Services of the United States, or a contractor of the United States Government, or an employee of a contractor of the United States Government, and in the course of such relationship

becomes possessed of information relating to intelligence sources and methods, knowingly communicates such information to a person not authorized to receive it shall be fined not more than $5,000 or imprisoned not more than five years, or both;

(2) For the purposes of this subsection, the term "information relating to intelligence sources and methods" means classified information concerning

(a) methods of collecting foreign intelligence;

(b) all sources of foreign intelligence, whether human, technical, or other; and

(c) methods and techniques of analysis and evaluation of foreign intelligence

and which for reasons of national security, or in the interest of the foreign relations of the United States, has been specifically designated for limited or restricted dissemination or distribution, pursuant to authority granted by law, Executive order, or Directive of the National Security Council, by a department or agency of the United States Government which is expressly authorized by law or by the President to engage in intelligence activities for the United States;

(3) A person not authorized to receive information relating to intelligence sources and methods is not subject to prosecution as an accomplice within the meaning of sections 2 and 3 of Title 18, United States Code, or to prosecution for conspiracy to commit an offense under this subsection, unless he became possessed of the information relating to intelligence sources and methods in the course of his relationship with the United States Government;

(4) This subsection shall not prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or the House of Representatives of the United States, or a joint committee thereof;

(5) In any judicial proceeding hereunder, the court may review, in camera, information relating to intelligence sources and methods designated for limited or restricted dissemination or distribution for the purpose of determining the reasonableness of such designation and the court shall not invalidate the designation unless it determines that the designation was arbitrary and capricious;

(6) Whenever in the judgment of the Director of Central Intelligence any person has engaged or is about

to engage in any acts or practices which constitute, or will constitute, a violation of this subsection, or any rule or regulation issued thereunder, the Attorney General on behalf of the United States may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with the provisions of this subsection, and upon a showing that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted.

Comparison of Department of Justice and CIA proposals to amend the National Security Act of 1947 to provide additional protection of Intelligence Sources and Methods from unauthorized disclosure

Section (g): The Justice version is simply the subtitle, "Disclosure of Classified Information," which is an incomplete description of the section. Also, the use of a subtitle is inconsistent with the format of the Act. The CIA version indicates the purpose of the amendment which is to further implement the DCI's responsibility for protecting intelligence sources and methods.

Subsection (1): The Justice bill includes in the definition of the special category of information to be protected the fact that the information is "classified." The inclusion of the word "classified" creates no practical difference from the CIA bill because the definition of "intelligence sources and methods" has been refined in the CIA version and now includes the element of classification.

The penalty in the CIA version has been reduced to five years and $5,000 whereas the Justice version remains at ten years and $10,000.

Subsection (2): The CIA version includes a more explicit definition of information relating to intelligence sources and methods including the requirement that it be classified information.

The CIA version makes the designation of the information to be protected that of "a department or agency of the United States Government

which is expressly authorized by law or by the President to engage in intelligence activities for the United States," whereas the Justice version limits the designation to the DCI pursuant to the authority vested in him by Executive Order and the National Security Council. The broader designation authority is necessary because departments and agencies in the Intelligence Community other than CIA possess information relating to intelligence sources and methods which requires protection.

Subsection (3): Identical except for the word "classified" in the Justice version which has no practical effect since the element of classification is incorporated in the definition in subsection (2) of the CIA version.

Subsection (4): Identical.

Subsection (5): There is no parallel provision in the Justice bill. The CIA version provides for judicial review of the designation of information as relating to intelligence sources and methods. This provision will protect a defendant in a case where the designation of the information as relating to intelligence sources and methods was arbitrary and capricious. The review of that determination is limited to an in camera proceeding, however, so as not to cause public revelation of additional sensitive information. A realistic and appropriate burden of proof as to the reasonableness of the designation is also established by the CIA provision.

Subsection (6): There is no parallel provision in the Justice bill. The CIA proposal provides for injunctive relief against unauthorized disclosure of protected information, but is applicable only to the limited class of individuals who are or have been in a special relationship with the United States Government as defined in subsection (1). Currently only the limited and cumbersome process of seeking injunctive relief based on contract theory is available to the Government. Marchetti v. U.S.

Department of Justice Draft
14 August 1974

A BILL

To amend the National Security Act of 1947, as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 102 of the National Security Act of 1947, as amended, (50 U.S.C.A. 403) is further amended by adding the following new subsection (g):

(g) Disclosure of Classified Information

(1) Whoever, being or having been in duly authorized possession or control of classified information relating to intelligence sources and methods, or whoever, being or having been an officer or employee of the United States, or member of the Armed Services of the United States, or being or having been a contractor of the United States Government, or an employee of a contractor of the United States Government, and in the course of such relationship becomes possessed of classified information relating to intelligence sources and methods, knowingly communicates such information to a person not authorized to receive it shall be fined not more than $10,000 or imprisoned not more than ten years, or both;

(2) For the purposes of this subsection, the term "classified information relating to intelligence sources and methods" means information relating to sources, methods or techniques concerning foreign intelligence which for reasons of national security or in the interest of the foreign relations of the United States has been specifically designated for limited or restricted dissemination or distribution by the Director of Central Intelligence pursuant to the authority vested in him by Executive Order and the National Security Council;

(3) A person not authorized to receive classified information relating to intelligence sources and methods is not subject to prosecution as an accomplice within the meaning of sections 2 and 3 of Title 18, United States Code, or to prosecution for conspiracy to commit an offense under this subsection, unless he became possessed of the classified information relating to intelligence sources and methods in the course of his relationship with the United States Government;

(4) This subsection shall not prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or the House of Representatives of the United States, or a joint committee thereof.

	UNCLASSIFIED		CONFIDENTIAL		SECRET

OFFICIAL ROUTING SLIP

TO	NAME AND ADDRESS	DATE	INITIALS
1	Director of Central Intelligence		
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	ACTION		DIRECT REPLY		PREPARE REPLY
	APPROVAL		DISPATCH		RECOMMENDATION
	COMMENT		FILE		RETURN
	CONCURRENCE		INFORMATION		SIGNATURE

Remarks:

Bill:

Attached are two packages: 74-3407/

a. letter to Saxbe regarding the modified intelligence sources and methods legislation; and

b. discussion of the trespassory electronic surveillance decision which the AG is being asked to make. 74-3407/2 & 3

I would like to discuss both of these with you and then an appointment can [redacted] you with Mr. Saxbe.

J[redacted]. Warner

Atts

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FROM: NAME, ADDRESS [redacted] ONE NO.	DATE
General Counsel, 7D01, [redacted]	

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(40)

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SENDER WILL CHECK CLASSIFICATION TOP AND BOTTOM

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OFFICIAL ROUTING SLIP

TO	NAME AND ADDRESS	DATE	INITIALS
1	Director of Central Intelligence	9/17	WEW/blp
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	ACTION		DIRECT REPLY		PREPARE REPLY
	APPROVAL		DISPATCH		RECOMMENDATION
	COMMENT		FILE		RETURN
	CONCURRENCE		INFORMATION		SIGNATURE

Remarks:

Bill:

Attached is a proposed letter for your signature to the AG requesting him to meet with you on our modified intelligence sources and methods legislation which is also attached. I now think we have a reasonable package which does take into account some of Justice's objections, but obviously not all.

Jo S. Warner

Att

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FROM: NAME, ADDRESS AND PHONE NO.	DATE
General Counsel, 7D01, Hdqs.	

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